Health Law and Ethics

Lobbying and Advocacy for the Public's Health: What Are the Limits for Nonprofit Organizations?

Jon S. Vernick, JD, MPH

ABSTRACT

Nonprofit organizations play an important role in advocating for the public's health in the United States. This article describes the rules under US law for lobbying by nonprofit organizations.

The 2 most common kinds of nonprofits working to improve the public's health are "public charities" and "social welfare organizations." Although social welfare organizations may engage in relatively unlimited lobbying, public charities may not engage in "substantial" lobbying. Lobbying is divided into 2 main categories. Direct lobbying refers to communications with lawmakers that take a position on specific legislation, and grassroots lobbying includes attempts to persuade members of the general public to take action regarding legislation. Even public charities may engage in some direct lobbying and a smaller amount of grassroots lobbying.

Much public health advocacy, however, is not lobbying, since there are several important exceptions to the lobbying rules. These exceptions include "nonpartisan analysis, study, or research" and discussions of broad social problems. Lobbying with federal or earmarked foundation funds is generally prohibited. (*Am J Public Health*. 1999;89: 1425–1429)

In the United States, many different types of organizations work to improve the public's health, including governmental agencies, community-based organizations, corporations, universities, and advocacy groups. An important category of such organizations is nonprofit groups—organizations that are not operated for the purpose of making a profit.

Nonprofit organizations enjoy certain benefits under the law that can make them a particularly effective platform from which to work for the public's health. The most prominent of these benefits is that qualifying nonprofit organizations are exempt from paying federal income tax. But the law also imposes limitations on the activities of nonprofit organizations if they wish to retain their tax-exempt status. One important limitation is that certain nonprofits are forbidden to engage in substantial lobbying activities.

For many nonprofits, however, understanding which activities are permissible advocacy for the public's health and which are the more restricted "lobbying" may be a matter of great confusion. As a result, these organizations may simply ignore the law, placing their tax-exempt status in jeopardy. Conversely, they may be reluctant to engage in perfectly legitimate activities rather than risk breaking legal rules that they understand imperfectly at best. This may make them less effective in accomplishing their public health goals. In addition, there has been a recent congressional focus on the political activities of nonprofits. This focus has produced several proposed or enacted changes to the lobbying rules.[1–3]

This article summarizes the law that applies to advocacy and lobbying by tax-exempt, nonprofit organizations, focusing on the 2 most common kinds of nonprofit organizations that advocate for the public's health—those designated under sections 501(c)(3) and 501(c)(4) of the US tax code. Because the law may differ depending on the source of an organization's funding, the specific rules for lobbying with federal, foundation, or private support are also summarized. The application of these basic rules is illustrated with examples. With a better understanding of the rules that apply to nonprofit organizations, public health professionals should recognize that some lobbying is permissible and that much public health advocacy does not fit the legal definition of lobbying.

Nonprofit Organizations

The law exempts from federal taxation the income of about 25 different kinds of organizations, which are described in title 26 of the US Code under section 501(c). Of these organizations, those qualifying as tax-exempt under sections 501(c)(3) and 501(c)(4) are the most common. Organizations covered by section 501(c)(3) include primarily educational, religious, and charitable institutions, "no part of the net earnings of which inures to the benefit of any private shareholder or individual."[4] There are 2 kinds of 501(c)(3) organizations: public charities and private foundations. Typically, universities, other educational organizations, hospitals, and churches are 501(c)(3) public charities. Private foundations include philanthropic organizations and other groups that do not derive a significant share of their revenues from public sources. Unless otherwise specified, for the remainder of this article, the term "501(c)(3) organizations" refers to public charities. Organizations under sec-

Requests for reprints should be sent to Jon S. Vernick, JD, MPH, Department of Health Policy and Management, Johns Hopkins School of Public Health, 624 N Broadway, Baltimore, MD 21205 (e-mail: jvernick@jhsph.edu).

Note. This article cannot provide a complete explication of all aspects of nonprofit lobbying law. It should therefore not be considered a substitute for outside legal advice.

tion 501(c)(4) are designed "for the promotion of social welfare . . . the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes."[5] These are often called "social welfare" organizations.

In many ways, 501(c)(3) public charities and 501(c)(4) social welfare organizations are quite similar. An organization that promotes public health goals may choose to be either kind of nonprofit. To qualify, the organization must complete an application to be reviewed by the Internal Revenue Service (IRS); once the application is approved, the organization's income is tax-exempt. (See Table 1 for a general comparison of public charities and social welfare organizations.)

There are also important differences between 501(c)(3) and 501(c)(4) organizations. Contributions to public charities are generally tax-deductible for the contributor, while those to social welfare organizations are not.[6] This may make contributions to public charities much more attractive for some donors. In exchange for this benefit, however, the law strictly limits the lobbying activities of public charities, while social welfare organizations, depending on the source of their funding, can engage in relatively unlimited lobbying. But just what is "lobbying"? To understand which activities are permitted for each kind of organization, it is necessary to first understand the legal definition of lobbying for nonprofits.

TABLE 1—Comparison of 2 Types of Nonprofit Organizations Described in Section 501(c) of Title 26 of the US Code

	Public Charity [§501(c)(3)]	Social Welfare Organization [§501(c)(4)]
Purpose	Religious, charitable, scientific, literary, or educational	Promotion of social welfare
Organizational income	Exempt from federal taxation	Exempt from federal taxation
Contributions to organization generally deductible	Yes	No
Electioneering permitted	No	Yes
Lobbying permitted	No "substantial" lobbying	Relatively unlimited lobbying

What is Lobbying?

Although in common usage the word "lobbying" has a relatively broad meaning, the legal definition is quite specific. At the outset, the law distinguishes lobbying from intervening in a campaign to support or oppose a candidate for public office, or "electioneering." Public charities may engage in some lobbying (see below), but electioneering is prohibited (see next section).

Federal law and IRS regulations divide lobbying (as opposed to electioneering) into 2 main categories: direct lobbying and grassroots lobbying. Activities that do not meet the definition of either direct or grassroots lobbying are not considered lobbying under the IRS rules.

The IRS defines "direct lobbying" as any attempt to influence legislation through communication with legislators, staff persons, or any other government official who participates in the formulation of legislation, where the communication (1) refers to specific legislation and (2) reflects a view on the legislation.[7] Simply letting a lawmaker know your position on specific legislation, then, is direct lobbying.

Rather than an attempt to influence legislators directly, "grassroots lobbying" is "any attempt to influence any legislation through an attempt to influence the opinions of the general public or any segment thereof."[8] Grassroots lobbying must (1) refer to specific legislation, (2) reflect a view on the legislation, and (3) include a "call to action."[9]

These definitions require some elaboration. According to the regulations, "specific legislation" includes not only bills already introduced in a legislature but also specific legislative proposals that have not been formally introduced. It does not include broad discussions of possible solutions to problems. It also does not include communications that are addressed to something other than a legislative body, such as an executive agency, an administrative body, or a court. For example, discussions with the Environmental Protection Agency about rulemaking to implement existing legislation are not lobbying.

Unlike direct lobbying, grassroots lobbying communications must also include a "call to action" encouraging members of the public to contact a legislator or any other government official who participates in the formulation of legislation. Indirect ways of issuing a call to action include providing the name, address, or telephone number of a legislator; providing a copy of a petition or some other way for the recipient to communicate with a legislator; or even simply identifying a particular legislator as having a position on the specific legislation or as the recipient's representative.[10]

How Much Lobbying is Permitted?

Nonprofit organizations may lobby. But under federal law, "no substantial part" of the activities of a 501(c)(3) public charity may consist of lobbying.[11] If a public charity engages in too much lobbying, it will be assessed an extra tax, it will lose its tax-exempt status, or both. The IRS will judge whether a public charity has engaged in too much lobbying in either of 2 ways. Under the "no substantial part" test, the IRS looks at all the facts and circumstances surrounding the lobbying and determines whether the lobbying is substantial. Although the IRS does not specify a maximum amount, some commentators and courts have concluded that it is safe to devote about 5% of an organization's total efforts to lobbying.[12,13]

Instead of submitting to the "no substantial part" test, a public charity may choose to be governed by the lobbying limits contained in section 501(h) of the tax code—this is called making the 501(h) election. Electing charities must fill out a form notifying the IRS that they wish to be governed under this section, and then a sliding scale applies to the amount of permissible lobbying. For the first $500 000 of an organization's tax-exempt expenditures, a total of 20% ($100 000) may be spent on all lobbying; no more than 5% of the $500 000 ($25 000) may be spent on grassroots lobbying. As an organization's budget increases, the percentage that may be used for lobbying decreases, until a maximum of $1 million in lobbying expenditures is reached.[14]

Obviously, it can be a real advantage for a public charity to make the 501(h) election. With the election, there is more certainty about what amount of lobbying is permitted, and generally a higher ceiling applies. In addition, certain nonmonetary expenditures, such as the time spent by organizational volunteers, are generally not included in the lobbying limits under the 501(h) election.

These lobbying rules apply to attempts to influence legislation. Electioneering—attempting to influence an election—is a different matter. Public charities are forbidden to "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."[15] For example, endorsing or publicly opposing the election of a particular candidate is not permitted; no sliding scale applies,

TABLE 2—Summary of Lobbying Rules for Nonprofit Organizations Described in Section 501(c) of Title 26 of the US Code, by Source of Funds Used for Lobbying

Source of funds	Public Charity [§501(c)(3)]	Social Welfare Organization [§501(c)(4)]
Private	No "substantial" lobbying May choose 501(h) election: of first $500 000, may spend $100 000 on all lobbying ($25 000 maximum on grassroots lobbying)	Relatively unlimited lobbying related to nonprofit purpose
Federal grant or contract	May not lobby with federal funds	May not lobby with federal funds Organizations choosing to lobby may not receive federal funds
Foundation	Private foundations may not lobby or earmark funds for the lobbying activities of other organizations; they may fund through general support grants 501(c)(3) or 501(c)(4) organizations that choose to lobby	

and a public charity that engages in such activities risks losing its tax-exempt status.

Other activities, such as sponsoring candidate forums or issuing voter guides, depending on their form and content, may also qualify as electioneering. In general, to be permissible such activities must be nonpartisan. Candidate forums to which all bona fide candidates are invited and that provide fair and impartial treatment without promoting one candidate's interests over another are not considered electioneering.[16] Voter guides that report how legislators have voted on selected issues may be considered electioneering unless the public charity follows a number of IRS guidelines.[17] This is a risky area of the law, however, and public charities are advised to proceed with caution.

By comparison, a 501(c)(4) social welfare organization may engage in relatively unlimited lobbying in areas related to its mission. Social welfare organizations may even intervene in political campaigns as long as this is not their primary purpose. For this reason, some public charities also have associated ("sister") social welfare organizations. This allows the public charity to shift some or all of its lobbying activities to its sister organization.

What Activities Are Not Considered Lobbying?

Activities that do not meet the IRS definition of direct or grassroots lobbying, as described above, do not count toward the lobbying limits for 501(c)(3) public charities. For example, a public charity could choose to place an advertisement in a newspaper indicating its support for specific pending legislation. Because that advertisement would be addressed primarily to members of the public, without a "call to action" that advertisement would not constitute grassroots lobbying.

But some activities that do seem to meet the definition of lobbying nevertheless do not count against the permissible lobbying limits for public charities, because they fit within one of the recognized exceptions established by the tax code. One important exception, particularly for academic or research-oriented organizations, is "nonpartisan analysis, study, or research," defined as "an independent and objective exposition of a particular subject matter." Nonpartisan analysis, study, or research may support or oppose specific legislation "so long as there is a sufficiently full and fair exposition of the pertinent facts to enable the public or an individual to form an independent opinion or conclusion."[18] A biased or unsupported presentation of information would therefore not fit within this exception.

Nonpartisan analysis, study, or research need not be in the form of a written report; even verbal communications can qualify. In addition, to qualify, the communication must not be made solely to persons who are interested in only one side of a particular issue. For example, for a research report to qualify for the exception, it should not be sent only to those members of a congressional committee who supported a particular legislative proposal. Instead it should be sent to all members of the committee. Although nonpartisan analysis, study, or research may reflect a view on specific legislation, it may not directly encourage the reader to contact a lawmaker.[19]

Another important exception covers discussions of "broad social, economic, and similar problems." Because the definition of lobbying refers to "specific legislation," it is not lobbying to communicate with a lawmaker about matters of general concern, even if they are the sort of issues that might later become the subject of legislation. For example, it is not lobbying to communicate with a lawmaker about the importance of motor vehicle injuries as a public health problem. It would, however, be direct lobbying to express support to a lawmaker for mandatory seat belt use laws, even if such a bill were not currently pending before the relevant legislative body.[20]

Responses to requests for technical advice or testimony from lawmakers also do not count as direct lobbying. However, the request must be in writing on behalf of a full committee or subcommittee, not simply from a single lawmaker on his or her own behalf. For example, in response to a written request on behalf of a legislative committee for hearing testimony, a member of a 501(c)(3) public charity could support or oppose a specific bill before that committee without that action counting against the organization's lobbying limits.[21]

More permissive rules also apply to a public charity's communications with its own members and to so-called self-defense lobbying on matters related to the organization's existence or tax-exempt status. When a public charity communicates solely or even primarily with its own members, it may take a position on specific legislation so long as it does not directly encourage its members to lobby. For example, in its member newsletter a public charity could state its support for pending legislation and even provide the names of legislators who support or oppose the bill. This communication would not be lobbying unless the newsletter also encouraged members to contact one or more of those legislators.[22] Under the exception for self-defense lobbying, a public charity may communicate with legislators, but not the general public, about matters that might "affect the existence of the electing public charity, its powers and duties, its tax-exempt status, or the deductibility of contributions to the organization" without those communications counting toward the lobbying limits.[23]

Where Does the Money Come From?

The above rules apply generally to lobbying conducted by public charities and social welfare organizations with private funds, such as donations from individual citizens. Many nonprofit organizations that advocate for the public's health, however, derive an important share of their operating funds from grants and contracts provided by the federal government or private founda-

TABLE 3—Examples of the Application of Lobbying Rules for US Nonprofit Organizations

For each example, assume that ABC is a 501(c)(3) public charity whose only source of revenue is private funds, and whose president is Smith. HB 100 is a pending bill before a state legislature.

Action	Considered Lobbying?
Smith visits a legislator and expresses ABC's support for HB 100	Direct lobbying: a communication to a legislator expressing a position on specific legislation.
ABC endorses HB 100 in its member newsletter	Not direct lobbying: no communication with a legislator Not grassroots lobbying: no call to action
ABC places a newspaper ad saying that HB 100 represents an important issue and urging readers to tell their legislators how they feel about it	Not grassroots lobbying: no position taken on the bill
Smith is invited by a legislator to testify at a hearing about HB 100; at the hearing, Smith expresses ABC's support for the bill	Direct lobbying, unless request for testimony was in writing on behalf of the whole (sub)committee or otherwise fits an exception
HB 100 is enacted; ABC sues the relevant administrative official or agency, demanding full implementation of the new law	Not lobbying to seek enforcement of an existing law
Smith goes to Washington, DC, to urge Congress member Jones to introduce a federal bill just like state's HB 100	Direct lobbying: takes a position on specific legislation, even though no bill has yet been introduced in Congress
Smith then discusses with Jones the importance of public health; Jones introduces HB 101 to increase federal spending for public health	Not lobbying to discuss broad social or economic issues, even if the legislator later introduces a bill

tions. And the lobbying rules can change depending on where the money comes from (see Table 2).

Unlike 501(c)(3) public charities, private foundations may generally not engage in lobbying without incurring substantial penalties. This does not mean, however, that private foundations are unable to provide grants to organizations that lobby. In fact, foundations regularly fund such organizations.[24] Private foundations may provide general support grants to organizations that lobby as long as none of the foundation's funds are earmarked for lobbying, and they may even fund the nonlobbying portion of a specific project that includes both a lobbying component and other activities.[25] For the purposes of these rules, the definition of lobbying for public charities and private foundations is virtually the same.

There are also a variety of rules that restrict lobbying with federal funds.[26,27] For nonprofit organizations, the most relevant of these are embodied in "circulars" issued by the Office of Management and Budget (OMB). These circulars, though not precisely the same thing as a law or regulation, provide instructions about what kinds of costs can and cannot be charged to the federal government by a grantee. OMB circular A-21 applies to educational institutions and A-122 applies to all other nonprofit organizations. Both have the same rules regarding lobbying. In general, costs associated with attempting to influence the introduction, enactment, modification, or signing of federal or state legislation, whether through contact with legislators or members of the general public, are "unallowable." As with the IRS lobbying rules more generally applicable to public charities, certain exceptions apply, such as responding to a request for technical or factual presentations by Congress or a state legislature.[28]

In 1995, a new restriction was added to federal law regarding lobbying by nonprofit organizations. The so-called Simpson Amendment forbids 501(c)(4) social welfare organizations that choose to lobby from receiving federal funds of any kind. That means that if a social welfare organization lobbies, even with private funds, it becomes ineligible to receive any federal funds.[1] Because the primary advantage of 501(c)(4) status is the ability to engage in relatively unlimited lobbying with private funds, the Simpson Amendment may be a real obstacle to social welfare organizations that rely on federal funds for other activities. However, to minimize the effects of the new law, social welfare organizations can still organize affiliated nonprofits to either engage in lobbying or receive the desired federal funds.

Table 3 provides a brief set of examples to clarify the application of the various lobbying rules and exceptions.

Are Lobbying Restrictions Constitutional?

Some organizations that wish to enjoy the benefits of nonprofit status have been troubled by the lobbying restrictions imposed by Congress on 501(c)(3) public charities. One such organization, Taxation With Representation of Washington (TWR), wished to engage in substantial lobbying but nevertheless applied for 501(c)(3) status so that private contributions to the organization would be tax-deductible. When the IRS denied its application for public charity status, TWR brought a lawsuit in federal court arguing that the lobbying restrictions were unconstitutional. Specifically, TWR argued that the restrictions violated its free speech rights under the First Amendment and its equal protection rights under the Fifth Amendment.

In 1983, the United States Supreme Court upheld the constitutionality of the lobbying restrictions in the case *Regan* [*Secretary of the Treasury*] *v Taxation with Representation of Washington*.[29] Writing for a unanimous court, Justice Rehnquist first recognized that granting TWR public charity status despite its substantial lobbying activities would amount to a public subsidy of those activities. He then framed the issue in the case as "not whether TWR must be permitted to lobby, but whether Congress is required to provide it with public money with which to lobby." He determined that the law "does not deny TWR the right to receive deductible contributions to support its nonlobbying activity. . . . Congress has merely refused to pay for the lobbying out of public money," and he concluded that "this Court has never held that Congress must grant a benefit such as TWR claims here to a person who wishes to exercise a constitutional right."[30] TWR's ability to form a sister 501(c)(4) organization that could lobby (albeit without tax-deductible contributions) was also important to the Court's conclusion that the lobbying restrictions were not unduly burdensome.

The constitutionality of the Simpson Amendment, which prevents social welfare organizations that lobby with private funds from receiving federal grants, has also been questioned.[31] No cases challenging its legality have yet been decided.

Conclusion

Nonprofit organizations, even public charities, may lobby, though the amount of lobbying permitted may be limited. Further restrictions apply to lobbying with federal or foundation funds. Nevertheless, much public

advocacy is not considered lobbying under the IRS rules, either because it does not fit the definition of lobbying or because it meets a recognized exception. By better understanding the rules applicable to lobbying, nonprofit organizations working to improve the public's health can maximize their effectiveness while minimizing the possibility of endangering their nonprofit status. In addition, nonprofits can be in a better position to appreciate the impact of any proposed new restrictions on their lobbying. □

Acknowledgments

This research was supported in part by grant R49CCR302486 from the Centers for Disease Control and Prevention to the Johns Hopkins Center for Injury Research and Policy.

References

1. Lobbying Disclosure Act of 1995, 2 USC §1611 (1995).
2. Arenson K. Legislation would expand restrictions on political advocacy by charities. *New York Times*. August 7, 1995:A-10.
3. Taxpayer Protection and Money Laundering Prevention Act, HR 233, 105th Cong (1997).
4. 26 USC §501(c)(3) (1986 & Supp 1997).
5. 26 USC §501(c)(4) (1986 & Supp 1997).
6. 26 USC §170 et seq (1986 & Supp 1997).
7. 26 CFR §56.4911-2(b)(1)(i) (1997).
8. 26 CFR §56.4911-2(b)(2)(i) (1997).
9. 26 CFR §56.4911-2(b)(2)(ii) (1997).
10. 26 CFR §56.4911-2(b)(2)(iii) (1997).
11. 26 USC §501(c)(3) (1986 & Supp 1997).
12. *Seasongood v Commissioner*, 227 F2d 907 (6th Cir 1955).
13. Galston M. Lobbying and the public interest: rethinking the Internal Revenue Code's treatment. *Tex Law Rev.* 1993;71:1269–1354.
14. 26 USC §4911(c)(2) (1986 & Supp 1997).
15. 26 USC §501(c)(3) (1986 & Supp 1997).
16. Rev Rul 86-95, 1986-2 CB 73 (1986).
17. Rev Rul 80-282, 1980-2 CB 178 (1980).
18. 49 CFR §56.4911-2(c)(1)(ii) (1997).
19. 49 CFR §56.4911-2(c)(1) (1997).
20. 49 CFR §56.4911-2(c)(2) (1997).
21. 49 CFR §56.4911-2(c)(3) (1997).
22. 49 CFR §56.4911-5 (1997).
23. 49 CFR §56.4911-2(c)(4) (1997).
24. Asher TR. *Foundation Support of Advocacy*. Washington, DC: Alliance for Justice; 1995.
25. 49 CFR §53.4945-2 (1997).
26. 41 USC §256(e)(1)(B) (1986 & Supp 1997).
27. 18 USC §1913 (1986 & Supp 1997).
28. OMB Circular A-21, 44 FR 12368 (February 26, 1979) and amendments.
29. 461 US 540 (1983).
30. *Regan v Taxation With Representation of Washington*, 461 US 540, 545 (1983).
31. Moody AE. Conditional federal grants: can the government undercut lobbying by nonprofits through conditions placed on federal grants? *B C Environ Aff Law Rev.* 1996;24:113–158.